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Nos. 87-1632, 87-1697, and 87-17

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

**OCTOBER TERM, 1987**

**PHILIP BRENDALE,**

*Petitioner,*

v.

**CONFEDERATED TRIBES AND BANDS  
OF THE YAKIMA INDIAN NATION, et al.,**

*Respondents.*

**STANLEY WILKINSON,**

*Petitioner,*

v.

**CONFEDERATED TRIBES AND BANDS  
OF THE YAKIMA INDIAN NATION,**

*Respondent.*

**COUNTY OF YAKIMA et al.,**

*Petitioners,*

v.

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OF THE YAKIMA INDIAN NATION,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE NINTH CIRCUIT**

**Brief Of The States Of Arizona, Idaho Michigan,  
Montana, Nevada, New Mexico, North Dakota,  
Utah, Washington, And Wyoming As Amici  
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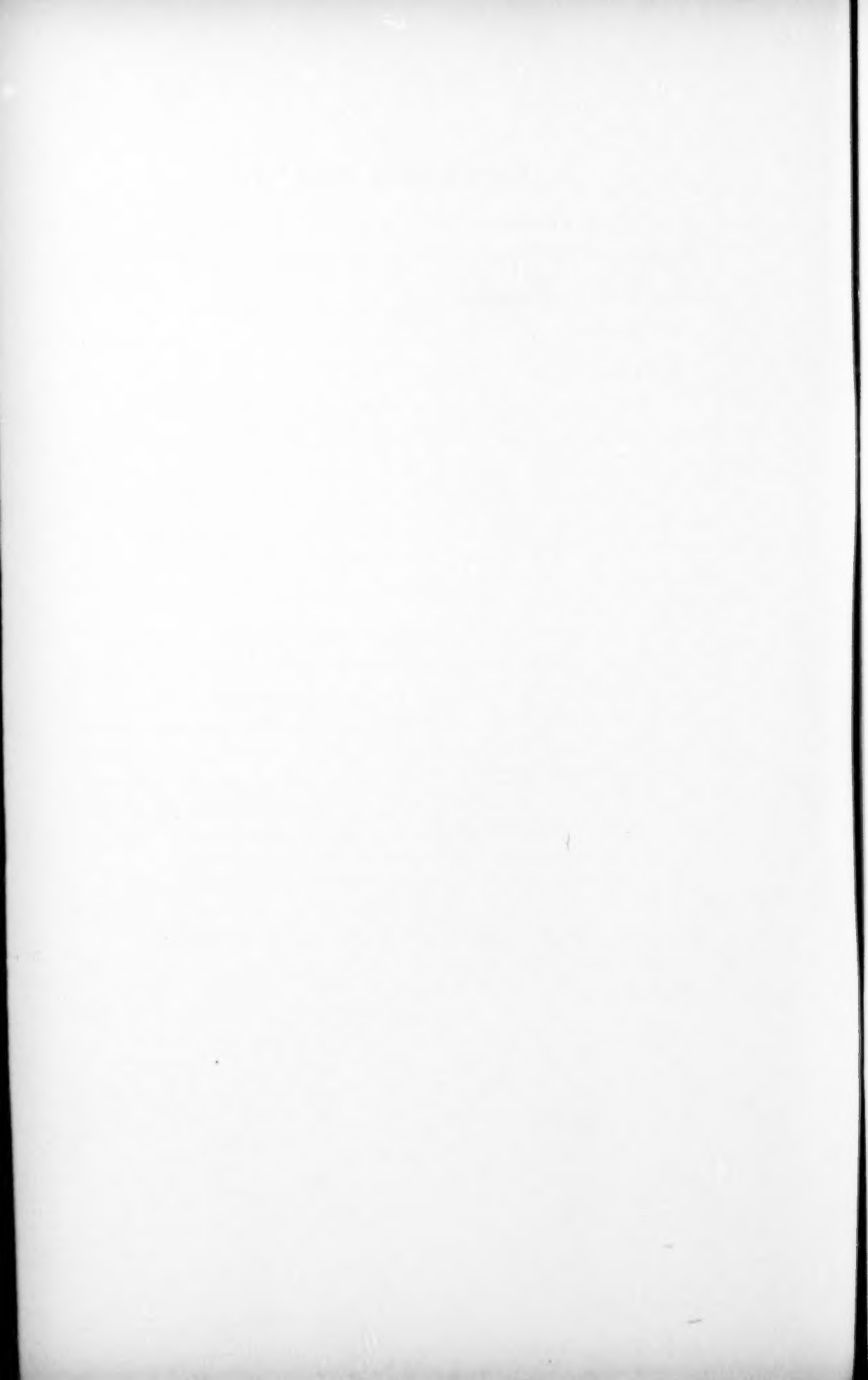
## QUESTIONS PRESENTED

1. Does an Indian Tribe have the authority to control, through comprehensive zoning, the use of land owned by non-members but located within a reservation's boundaries, under either of the following circumstances:

- (a) The land has been alienated to a non-Indian, pursuant to the federal Allotment Acts; or
- (b) The land, originally allotted to a tribal member, has been received through inheritance by an heir of such member, but the heir, by reason of insufficient blood quantum, is not a tribal member?

2. Is it constitutionally permissible, under the Due Process Clause of the Fifth Amendment to the United States Constitution, for the United States acting through either the Congress, the Executive Branch, or the courts, to adopt a policy pursuant to which:

- (a) Indian tribal governments have general civil regulatory jurisdiction over non-member reservation residents and their on-reservation property; and
- (b) Such residents have none of the rights of participation in tribal government, as either voters in tribal elections or as candidates for tribal offices, enjoyed by tribal members, and, by reason of their ancestry, are disqualified from ever attaining such rights through tribal membership?





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Nos. 87-1622, 87-1697, and 87-1711

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**Brief Of The States Of Arizona, Idaho Michigan,  
Montana, Nevada, New Mexico, North Dakota,  
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Curiae In Support Of Petitioners**  

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**INTEREST OF THE STATES AS AMICI CURIAE**

Each of the States submitting this brief has within it one or more Indian reservations. On many of those reservations the "familiar forces" set in motion by the Federal Gov-



ernment in the late 1800's and alluded to by this Court in *DeCoteau v. District Court*, 420 U.S. 425, at 431 (1975), have produced the expected results. Pursuant to the invitation of the Federal Government, non-Indians have purchased land and established their homes and businesses there, and in many cases now actually outnumber the Indian population.<sup>1</sup> We estimate the total non-Indian reservation population, nationwide, to be about 350,000.<sup>2</sup> The Yakima Reservation provides a typical example of these "familiar forces"; the non-Indian population, about 20,000, is over four times the Indian population.

The Yakima Reservation also provides an example of the types of claims being made by the Tribes affected by those forces. The Yakima Tribe here claims that its inherent tribal sovereignty includes within it not only governmental power over its own members, but also civil regulatory power over non-Indians and their property. Secondly, the Tribe claims that the exercise of such power over non-Indians and their property preempts any similar power by State and local governments. In *Whiteside I*, the court below upheld both claims. In *Whiteside II*, it upheld the first, but left the second for later resolution.<sup>3</sup>

The interest of the amici States in this case is thus two-fold. The first is in protecting a large group of the State's citizens from a tribal government in which they cannot participate in any manner, and the actions of which, however arbitrary, are not subject to any effective judicial checks. Second, if the decision below is not reversed, we fully expect

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<sup>1</sup> A state-by-state list of all reservations has been attached as Appendix A to the amicus brief of the states of Arizona et al. in support of the petitions for a writ of certiorari in this case (hereinafter "State amicus brief in support of certiorari"). This list also contains the total population and the Indian and non-Indian populations for each reservation. See p. 2, note 1, of that brief for the source of the list. While that list apparently applies the term "Indian" to all persons with Indian blood, we shall use the term "non-Indian" to include all non-members even though they may have Indian blood and some tribal affiliation.

<sup>2</sup> See Appendix A to State amicus brief in support of certiorari for the data from which this estimate is made.

<sup>3</sup> Cause No. 87-1622 encompasses *Whiteside I*, and Cause Nos. 87-1697 and 87-1711 encompass *Whiteside II*.

even more claims of tribal preemption of State power over non-Indians, not just in the area of zoning, but in broader areas such as environmental controls, taxation, and general business regulation. Thus, tribal governments in which non-Indians have no voice and over which there are no effective political or legal checks may be increasing the scope of their powers, and gradually replacing, as a practical matter, those governmental bodies in which the non-Indians do have a voice and over which there are effective checks. Further, a serious balkanization of government within each State, and a breakdown of each State's power over these non-Indians, would inevitably result.

We cannot countenance such a development. Nor should this Court.

### SUMMARY OF ARGUMENT

1. We first address the question: How should the Court view its function in this case? A balance of federal, tribal, and state interests must inevitably be struck. But rather than striking the balance itself, by developing some sort of common law of tribal sovereignty, the Court should ascertain, from specific treaties and statutes, how Congress has struck the balance, with the concept of tribal sovereignty providing only a "backdrop" for the interpretive process. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). This approach, moreover, is essentially that utilized in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

2. Article II of the Treaty with the Yakimas, 12 Stat. 951 (1959) reserves certain lands for the Yakimas' "exclusive use and benefit", and prohibits non-Indians from going onto those lands without tribal permission. These provisions are, in effect, the Tribe's charter for self-government. But they shed little light on the central question here: Is the Tribe to have jurisdiction over non-Indians on non-Indian lands as well? For there were to be no non-Indian lands within the reservation at all, and few, if any, non-Indians.

3. The allotment policy in large part rescinded the original promise contained in these provisions, by inviting non-Indians to buy land and settle within the reservation. That policy, moreover, contemplated the elimination of tribal self-

government and the whole reservation system, and thus contained another promise, *viz.*, that these non-Indians and their successors would be free from tribal control. The allotment policy, however, did not run its course; in 1934 the Indian Reorganization Act ("IRA") intervened.

Viewed in light of its legislative history, the IRA actually confirmed the promise of the allotment acts that non-Indians would be free from tribal control. For the original bill, drafted and vigorously supported by the Interior Department, would have expressly authorized tribal legislative and judicial power over non-Indians, through the device of federally chartered Indian communities. This proposal, however, proved so controversial that it was stripped from the bill. And in two important opinions construing the IRA, issued shortly after its enactment, the Department of Interior in effect acquiesced in its defeat on this point, and expressly refused to recognize any broad tribal governmental power over non-Indians.

4. Our submission thus far is completely consistent with the rationale and result in *Montana v. United States* 450 U.S. 544 (1981). But *Montana* expressed two exceptions to its general conclusion that Tribes have no civil jurisdiction over non-Indians on non-Indian lands, the second involving conduct by non-Indians which " \* \* \* threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. How can that exception be reconciled with the promise of freedom from tribal control embodied in the allotment acts? And what is its scope?

We start with the proposition that " \* \* \* in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Those exceptions involve situations in which Indians are in effect destroying a State's ability to govern its own non-Indian citizens, as in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) or destroying a resource to which those citizens have a rightful claim, as in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977). The second exception in *Montana* would

encompass a parallel set of "exceptional circumstances"—mirror images of the first set—and would be firmly grounded on the treaty promise of self-government.

The treaty also contains an implied promise that the remaining Indian lands will be "livable". See *Montana*, 450 U.S. at 566, note 15. This promise may create a right to prevent uses of non-Indian property within a reservation that would make the adjacent Indian property "non-livable". To the extent it exists, that right would be enforceable through a type of nuisance action in court or through existing state and local land use procedures. Moreover, should a State or local government completely abdicate its zoning responsibility, so that neither a nuisance action nor existing land use procedures would adequately protect the "livability" of Indian lands, tribal power could arguably fill the gap. But in this case, of course, there is no such gap.

Moreover, Congress has been quite willing, in recent years, to protect tribal interests by granting authority over non-Indians when the Tribes can show the need for it. Such areas as liquor sales, water quality, and air quality provide examples. These actions by Congress caution against an expansive reading of the *Montana* exceptions.

5. Constitutional considerations likewise caution against any such reading. Because non-Indians will have no effective checks, judicial or political, over the exercise of tribal power, the temptation to abuse that power may prove irresistible. This total lack of accountability raises serious constitutional questions. While tribal governments are shielded from the Bill of Rights, the Federal Government is not. Yet tribal governments have legal powers—indeed, legal existence—only because they are recognized as such by the Federal Government and have, once recognized, only those powers which that government intends them to have. This close relationship brings the familiar "state action" doctrine into play.

This doctrine, in turn, brings into operation the guarantees established in the Court's voting rights decisions. And an expansion of the scope of tribal government over non-Indians beyond those narrow limits which we have suggested can be constitutionally justified only if accompanied by a parallel expansion of the right to participate in that government.



## ARGUMENT

### I. Introduction.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court held that the Crow Tribe could not prohibit or otherwise regulate the use of non-Indian reservation land for hunting and fishing. In this case, the court below held that the Yakima Tribe could regulate and even prohibit the use of the same type of land for just about any other purpose.

These sharply different results stem from the different rationales utilized by each court. In *Montana*, the Court concluded that the principles relied upon in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) are generally applicable on the civil, as well as the criminal side, and thus preclude tribal civil jurisdiction over non-Indians on non-Indian lands. The Court also concluded that the policies embodied in the various allotment acts, such as the General Allotment Act of 1887, 24 Stat. 388, require this result as well.

The Court in *Montana* expressed, however, two qualifications or exceptions to this general result, which are at the heart of the controversy here. Seizing upon these exceptions, the court below has construed and applied them so broadly as to swallow up the general rule established in *Montana*, and has thus eviscerated the protections accorded to non-Indians in the allotment acts.

The first of the two exceptions is as follows:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [citations omitted] *Montana*, 450 U.S. at 565-566.

The Court then immediately stated the second:

A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [citations omitted] *Montana*, 450 U.S. at 565-566.



A central issue in this case is the scope of this second exception, which we shall examine at some length.<sup>4</sup> We would here simply ask: Is that exception "a creature of judicial cloth"? *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, at 141 (1981). Or is it a creature of "legislative cloth"?<sup>5</sup> *Ibid.* Although the Court must certainly do the weaving, the major materials, we submit, must be statutes and treaties; and the task in this case is, in the final analysis, to determine congressional intent, not to fashion some sort of common law of Indian sovereignty.

Fifteen years ago, this Court rejected reliance upon "platonic notions of Indian sovereignty" as a basis for determining the scope of an Indian's immunity from state law. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). In so doing, the Court stated that one must "\* \* \* look instead to the applicable treaties and statutes which define the limits of state power," with the concept of Indian sovereignty providing only a "backdrop" for the reading of those treaties and statutes. *Ibid.*

*McClanahan* provides the proper approach here as well. This case involves, to be sure, an effort by an Indian community to assert governmental power over a member of the non-Indian community and not, as in *McClanahan*, an effort by the non-Indian community to assert governmental power over a member of the Indian community. But that difference does not make the platonic notion of Indian sovereignty any more useful here, or concentration upon applicable treaties and statutes any less important.

This is not to suggest that judge-made law is unimportant; far from it. But that judge-made law should be, in the final analysis, an effort to ascertain the intent of the Congress, as manifested in various federal statutes and treaties,

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<sup>4</sup>Under the facts of this case, it is difficult to see how the first could possibly be applicable; for there are no consensual relationships of any sort involved here at all.

<sup>5</sup>During oral argument in *Oliphant*, essentially the same threshold question was phrased this way by a member of the Court:

Well, what is it? Is it just sort of a federal common law which we are not \* \* \* if this Court holds that the Tribe has some residual sovereignty, what authority have we got to say that? Is this sort of a federal common law?

Tr. of oral argument, p. 44.

and not an exercise in divining the content of a platonic notion through an exegesis of the Court's prior opinions.

Moreover, whether one views the problem of the scope of tribal jurisdiction over non-Indians as one of "common law" or of Congressional intent has important practical consequences. Problems in this area necessarily involve a balancing of federal, state and Indian interests; and it makes a difference whether the Court views its role as that of striking the balance itself, or instead ascertaining the balance that Congress has struck.

The manner in which the Congress has struck the balance may not always be clear. But to abandon the focus upon Congressional intent is to invite *ad hoc* decision making, and to render stability, predictability, and uniformity of results, both over time and among reservations, virtually impossible.

Furthermore, to recognize that the question ultimately is one of Congressional intent is to recognize also that the Constitution may have a bearing on the question, so as to restrict the range of choices open to the Congress in this area, no less than in others, and that fundamental civil rights are here at stake.

One last preliminary point. The approach which we here suggest is essentially that taken by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the supposed fountainhead of the notion of tribal sovereignty. The question there before the Court was whether the State of Georgia had the power to control the right of non-Indians to enter Cherokee territory, and, even more broadly, to adopt a set of laws taking complete control over the affairs of the Cherokee Nation. To answer that question, the Chief Justice examined in great detail the various provisions of two treaties between the Cherokees and the United States; *viz.*, the Treaty of Hopewell, 7 Stat. 18 (1785) and the Treaty of Holston, 7 Stat. 39 (1791), together with various Acts of Congress regulating Indian affairs. See 31 U.S. (6 Pet.) at 551-556. From this analysis he concluded that the Cherokees were intended by Congress to be " \* \* \* a nation admitted to be capable of governing itself," and accordingly free of the control which Georgia was asserting. 31 U.S. (6 Pet.) at 556.

The Chief Justice, in short, utilized an inductive, rather

than a deductive approach. He did not start with the platonic notion of tribal sovereignty, and then attempt to ascertain what governmental powers were encompassed by that notion. Rather, he asked what conclusion was required by specific treaty and statutory provisions. Thus, the approach we here suggest is historically, as well as analytically, the correct one.

## **II. The Court of Appeals Has Completely Disregarded the Intent of Congress, As Embodied in the Allotment Acts.**

In denying to the Crow Tribe the authority to regulate hunting and fishing by non-Indians on non-Indian lands, the Court in *Montana* relied not only upon the *Oliphant* rationale, but also upon the policies of Congress, as embodied in the Allotment Acts of the late 1800s, pursuant to which the non-Indians had obtained those lands in the first place.

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal affairs and jurisdiction. [citations omitted] It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. \* \* \* *Montana*, 450 U.S. at 559, note 9.

The court below has effectively torn up the protections which Congress intended non-Indians to have under the allotment acts. But has the Congress itself torn up those protections, when it halted the allotment process in 1934 by enacting the Indian Reorganization Act? As we shall next show, far from tearing them up, Congress actually confirmed them.

## **III. The Indian Reorganization Act of 1934 Did Not Repudiate the Policy Embodied in the Allotment Acts That Tribes Would Have No Civil Jurisdiction over Non-Indians, but Confirmed That Policy.**

The original Wheeler-Howard Act, now commonly referred to as the Indian Reorganization Act of 1934 ("IRA"),

was an extremely comprehensive and controversial piece of legislation. It contemplated a major reversal of Federal Indian policy.

In both the Senate and the House of Representatives, the bill received almost unprecedented attention. In the House alone, the Committee on Indian Affairs held 29 sessions on the bill. 78 Cong. Rec. 11,726 (1934). The Chairman of that Committee, Mr. Howard stated: "[i]t is doubtful if any piece of legislation in the history of the country has been more thoroughly and intelligently studied and debated \* \* \*

*Id.* at 11,731. This study and debate resulted in a complete revision of the original bill, which had been drafted by the Interior Department. "It was so drastically amended that they took out everything but the title." *Id.* at 9268 (statement of Mr. Peavey). And as stated by Congressman Ayers of Montana, the original bill, "\* \* \* was never Wheeler's or Howard's baby \* \* \* it was laid on their doorstep, and they have cast it off and brought forth legitimate offspring." *Id.* at 12,165<sup>6</sup>.

We first examine the original bill, and then trace through the changes which resulted in the IRA as finally enacted.

#### A. The Original Wheeler-Howard Act.

The original bill contained four separate titles: Title I—Indian Self-Government; Title II—Special Education for Indians; Title III—Indian Lands; and Title IV—Court of Indian Affairs. Title I was the heart of the bill, and § 2, in turn, was the heart of Title I. Under § 2, the Secretary of the Interior would have been given authority to issue charters creating Indian communities and transferring to them "any and all such powers of government as may seem fitting in light of the experience, capacities, and desires of the Indians concerned."

Section 4 spelled out in more detail the powers which could be included in these charters. The first is found in subsection (a):

(a) To ~~organize~~ and act as a Federal municipal cor-

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<sup>6</sup>The original bill introduced as H.R. 7902 and S. 2755, is reproduced in Appendix A, and the amended version passed by Congress, S. 3645, is reproduced as Appendix B.



poration, to establish a form of government to adopt and thereafter amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, and any other functions customarily exercised by local governments. (Emphasis supplied.)

Subsection (d) granted another important power:

(d) To establish courts for the enforcement and administration of ordinances of the community, which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances or the community* \* \* \* (Emphasis supplied.)

The provisions of the bill establishing the new court system warrant closer examination, because they confirm that under the bill both legislative and judicial power would be exercised over non-Indians.

In Title I there was no provision for an appeal from the local courts established pursuant to subsection (d) of § 4. But this was addressed in another part of the bill which also dealt with courts; Title IV would have established a Court of Indian Affairs. Section 3 spelled out the broad jurisdiction of that court, which included jurisdiction in "all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4, emphasis supplied.)

The drafter of the original bill, Felix S. Cohen, explained the connection between the local court and the special Court of Indian Affairs:

Mr. Cohen. May I call attention to the connection between the local court and the special court of Indian affairs? The court of Indian affairs has general power to review decisions of the local court wherever a person not a member of the community is involved in the dispute. Readjustment of Indian Affairs: Hearings on H.R. 7902 before House Committee on Indian Affairs, 73rd Cong., 2d Sess. 80 (1934) (hereinafter "1934 House Hearings").

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-Indians residing



within it<sup>7</sup> — as broad as those of any municipal corporation or other unit of local government. And, as Felix Cohen testified, the local tribal court and the Court of Indian Affairs would have correspondingly broad jurisdiction over non-Indians as well. But as we shall next see, the Senate Committee of Indian Affairs objected to these provisions — and Titles I and IV were entirely eliminated from the final bill.

### **B. Objections to the Original Wheeler-Howard Act.**

Exactly why the legislative and judicial provisions were found objectionable is somewhat complicated. It was generally conceded that they might work on reservations where Indian lands and populations were already consolidated. But the Senate committee did not believe it would work on checkerboarded reservations, such as the Yakima Reservation at issue here.<sup>8</sup> Responding to these objections, the chief spokesman for the original bill, Commissioner Collier of the BIA, assured the committee that tribal jurisdiction over non-Indians would not be as extensive as might appear. Only when an extensive consolidation of both Indian land and Indian population had occurred would the tribe be allowed to set up an "Indian community". As Commissioner Collier explained, "Title III [Indian Lands] is pretty closely linked with Title I

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<sup>7</sup> See also the definitions in the original bill for "territory of a chartered community" and "reservation", which include non-Indian lands within those terms. Title I, § 13: 1; m, See also 1934 House Hearing at 7.

<sup>8</sup> An example of the committee consensus on this point is as follows: Senator Thomas [of Oklahoma]. If the bill would not work in the Navajo Reservation, where there is a great area populated exclusively by the Navajos, I can hardly see where it could operate in a State like mine\* \* \* Then they would be surrounded very likely with thickly populated white sections\* \* \*

I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly settled population. I think it may be all right in a place like the Navajos, so far as I can see now, or the Menomonees or the Klamaths.

The Chairman. I thought it would work among the Navajos and the Indians in New Mexico and Arizona if it would work any place. Readjustment of Indian Affairs: Hearings on S. 2755 before Senate Committee on Indian Affairs, 73rd Cong., 2d Sess. 145 (1934) (hereinafter "1934 Senate Hearings").

[Indian Self-Government]". 1934 Senate Hearings at 63. Although the original bill set no specific guidelines as to just when there would be enough consolidation in order to set up a chartered community, Commissioner Collier assured Congress as follows:

Mr. Collier. This bill in Title I deals with self-government of Indian tribes and provides that an Indian community which has a *solid geographic area* may have a court and enforce its laws through the court.

1934 Senate Hearings at 317. (Emphasis supplied.)  
And again:

Commissioner Collier. It is perfectly evident that a group of Indians who are scattered among whites, who are attending the public schools or using the common institutions, would not form a territorial government. They might do other things.\* \* \*

It is equally evident that Indians living in great solid geographical areas would do precisely that.

1934 Senate Hearings at 67-68.

Chairman Wheeler, a former county prosecutor in Montana, had two main objections to the original bill. First, he was worried that the Secretary of the Interior would not wait until there was a solid block of Indian land and Indian population before issuing the charters creating the Indian communities, and that establishing a "government within a government" under those circumstances would lead to "conflicts in the Northwest between the Indians and the whites".<sup>9</sup>

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<sup>9</sup> The following exchange is just one example in the hearings where the Chairman articulated his belief that the bill, if enacted as introduced, would lead to conflicts:

The Chairman. But it seems to me — for instance, take you Montana Indians — here is what you do: you say: [reading Title I, § 4 introduction to (a)]

Now, what do you mean by establishing a form of government?

Commissioner Collier. Municipal government.

The Chairman. \* \* \* If that is true, you are going to let them — [reading Title 1, § 4 (b), (c), (d), (e), (f), (g)]

In other words, you have practically delegated to the Indian Office all of the powers and the right to execute any power not inconsistent with the Constitution. Now, my own view about that matter is, as far as the Montana Indians are concerned, that it would be a step backward for them rather than a step forward.

Commissioner Collier. But Senator, the Montana Indians would not do that.

\* \* \*

In short, he did not accept Commissioner Collier's assurances.

Second, where the Indian lands and population were already consolidated, with the result that the Indians already controlled the existing units of local government, the new chartered community would just create an additional layer of government. Thus a representative of Montana's Blackfeet Tribe told the committee that his tribe would indeed attempt to form an Indian community government on top of the already existing State and local governmental structure, as the following exchange shows:

Senator Thomas [of Oklahoma]. Which would you do? Would you surrender your participation and activity in the present set-up, or would you form a new charter, new form of government, and move over and get into that?

Mr. Brown [of the Blackfeet Tribe]. We would take both of them. We can take both of them under the bill. 1934 Senate Hearings at 170.

What bothered the Senate committee about this arrangement was the fact that the Blackfeet Indians, unlike many other Northwest Tribes, but like many Southwest Tribes, such as the Navajos, already dominated the existing

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The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians of Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.

Commissioner Collier. Yes.

The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that would lead to conflicts in the Northeast between the Indians and the whites.

I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there; your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it.

Now, I am not as familiar with the Indians down in the Southwest, and it might be possible that it would work out all right for the Navajos.

1934 Senate Hearings at 67-68.

political community.<sup>10</sup> Thus, the irony of the original Wheeler-Howard Act is that on those reservations where it might have worked best it was needed least. More generally, the committee feared setting up an Indian community government which might enact laws which would conflict with those of the State and local governments. And it was because of these various concerns that the provisions conferring those powers were stripped from the bill. Titles I and IV were thus eliminated. As summarized by Senator Wheeler:

Chairman Wheeler. My thought about the bill is simply this: That you are going entirely too far at the present time in letting those tribes set up these rules and regulations, because they might conflict. As I said, when you take the Northwestern Indian reservations, as I pointed out, you have Indians at the present time holding county and State offices. Then, if you give them the power to set up an entirely new government within their reservations and to pass ordinances and regulate all Indian affairs, I think it would bring you into all kinds of conflicts  
\* \* \* 1934 Senate Hearings at 199.

### C. The Revised Wheeler-Howard Act (S. 3645)

The IRA which Congress adopted, as we have just seen, did not authorize the Secretary of the Interior to convey, or confirm, any compulsory governmental power over Indians, must less non-Indians.<sup>11</sup> In the words of Chairman Wheeler:

The Committee on Indian Affairs eliminated all those compulsory provisions and eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations. 78 Cong. Rec. 11,123 (1934).

After being stripped of all its controversial provisions, what the IRA did do, primarily, was to: (1) stop further alienation of Indian lands; (2) provide for acquisition of land for landless Indians; (3) stabilize the tribal organization by vesting them with "real, though limited, authority, and by prescribing conditions which must be met by such tribal

<sup>10</sup> See 1934 Senate Hearings at 169-170. See also *id* at 179, 198-200.

<sup>11</sup> See 1934 Senate Hearings at 248-249. From this portion of the hearings, it is clear that Congress intended that a recognized tribal member would be able to avoid the civil regulatory jurisdiction of his own tribe by withdrawing his membership in the tribe. Accord *Op. Sol. I.D. Aff.* 1917-1974, Vol. I, 484, 489-91 (Dec. 13, 1934), discussed at p. 18, *infra*.



organizations", and (4) provide that "Indian tribes may equip themselves with the devices of modern business organization through forming into business corporations". *Ibid.*

As summarized by Senator Wheeler:

\* \* \* [T]he bill proposes to give the Indians an opportunity to takeover the control of their own resources and fit them as American citizens. 78 Cong. Rec. 11,124 (1934).

In eliminating the objectionable features of the original bill it was thought that these governments within governments would "poison [the Indians] against their State constitution" and "their local governments, of which they are a part." *Id.* at 9268. It was also recognized that non-Indians would "kick like steers" if subjected to the proposed system. 1934 House Hearings, at 136.

Contrary to the conventionally accepted wisdom, then, the final version of the IRA did not contemplate a complete break with the assimilation policy contained in the allotment acts. It did eliminate, however, a major "driver" in that policy, *i.e.*, the ability of Indians to alienate their remaining lands. Most importantly, the IRA, viewed in the light of its long legislative history, represents a deliberate policy decision by the Congress that Indians would not have compulsory jurisdiction over non-Indians. And that is reason enough for this Court to deny any claim to such powers now.

#### **IV. The Understanding of the Executive Branch Has Been That Indian Tribes have No Inherent Civil Regulatory Power over Non-Indians**

The Department of Interior, as we have seen, was singularly unsuccessful in obtaining a bill which vested governmental powers in Indian tribes through the device of federally chartered Indian communities. A phrase in §16 of the IRA as enacted, however, provided a springboard for the Department to regain some lost ground. That phrase referred to "all powers vested in any Indian tribe \* \* \* by existing law".<sup>12</sup> In an opinion dated October 25, 1934, four months

<sup>12</sup> The Department of Interior drafted the final, as well as the original, version of the IRA. See 1934 Senate Hearings, at 237. Thus this phrase is the product of the Department's draftsmen; and it received little attention from the Committee. *Id.* at 244.



after enactment of the IRA, the Solicitor of the Department set out the Department's views as to what powers were encompassed by that phrase. See 55 I.D.14 (M-27781). Though signed by Solicitor Margold, the actual author of that opinion was the author of the original version of the IRA, Felix Cohen. See Cohen, *Handbook of Federal Indian Law*, ix, xiv (1942: Univ. N. Mex. reprint).

The basic premise underlying the whole opinion is set out as follows:

Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analysed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. \* \* \* What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law". 55 I.D. at 19.

With this sweeping start, one might expect that the opinion would then go on to enumerate broad powers over non-Indians as part of the "powers vested \* \* \* by existing law." But surprisingly, such is not the case at all. The powers discussed principally relate to what the opinion calls "internal sovereignty", *i.e.*, power over members 55 I.D. at 22. (See generally the opinion summary, 55 I.D. at 16-17.)

With respect to the power of taxation, however, the opinion states that such power extends not only to members, but also to nonmembers "\* \* \* so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I.D. at 46. This qualification is significant. Non-Indians on non-Indian lands within a reservation are there pursuant to the policy of the Federal Government, not at the sufferance of the Tribe. And the Tribe, accordingly, has no inherent power to tax them. "Existing law", as the writer of the opinion was certainly aware, still included the allotment acts.

This lack of inherent power to tax or otherwise regulate the persons or property of non-Indians on non-Indian land

was made explicit in a subsequent opinion of Solicitor Margold, issued just two months later, on December 13, 1934. In an opinion entitled "Wheeler-Howard Act — Interpretation", the Solicitor considered the specific question of the extent of the tribal power of condemnation. See Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I 484, at 489-491 (M. 27810).

The opinion first considered the source of this tribal power.

The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash. R.R. Co.* (223 U.S. 390, 404) "one of the powers vital to the public welfare of every self-governing community."

No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on "Powers of Indian Tribes" (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard Act. At 489.

Yet Solicitor Margold concluded:

I am of the opinion that the Indian Service is correct "in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by non-members." *Ibid.*

This inherent power of eminent domain, which is "one of the usual powers of sovereignty," may be exercised only with respect to tribal members.

From this, Solicitor Margold draws another important conclusion:

It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), "any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." \* \* \*

Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal sta-

tus. But if he remains to share in the benefits of tribal life he must bear its burdens.

The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law. At 490.

Non-Indians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the land of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it.

\* \* \*

Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490-491.

As this opinion explicitly recognizes, a tribal claim of general governmental power, even if it be on the civil side, and whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members.

Thus even the Department recognized that the "existing law" referred to in §16 of the IRA, together with the concept of residual tribal sovereignty which gave that "existing law" substance, did not encompass general governmental power over non-Indians. And the Department in effect acquiesced in the congressional rejection of its efforts to gain such power in the IRA.

Just as importantly, the argument that the concept of residual tribal sovereignty includes inherent power over non-Indians is to commit a basic error which Felix Cohen himself warns against. See Cohen, *Handbook of Federal Indian Law* *supra* pp. 358-360.

Quoting from a ruling by the Solicitor of the Interior Department, April 27, 1939, it is there noted that we must "\* \* \* beware of reading into the measure of this [Indian] jurisdiction the common law principle of territoriality of criminal law." *Id.* at 360. In establishing the source and scope of the Indian tribe's authority for self-government which derives from

\* \* \* the unextinguished fragments of tribal sover-

eignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. (*Ibid.*).

In short, although Tribes and their members were viewed by the Department as having more of a distinct legal status than Senator Wheeler may have thought, tribal governmental power, even over members, was still essentially consensual, just as Congressional Committees envisioned in 1934. For members could choose to become non-members.

**V. Under the Second Exception to the General Rule Established in Montana, Tribal Jurisdiction over Non-Indians on Non-Indian Land Should Be Limited to Situations Which Parallel, and Are Mirror-Images of, Those Situations in Which State Jurisdiction Applies to Reservation Indians.**

After establishing in *Montana* the general proposition that Tribes do not retain civil jurisdiction over non-Indians on non-Indian lands, the Court expressed two exceptions. In the second, it stated that a Tribe "may also retain" such jurisdiction when the conduct of the non-member "\* \* \* threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566. (Emphasis supplied)

\*. Determining the scope of this exception is difficult for several reasons. One difficulty stems from the use of the phrase "may \* \* \* retain". Does this mean "does retain"? Or does it mean: "A Tribe *might* retain — but it all depends on the circumstances"?

The four cases cited in support of the exception compound, rather than eliminate, this difficulty. Not one of them involved the central question in this case, *viz.*, the power of a Tribe to make an unwilling non-Indian submit to its jurisdiction.<sup>13</sup>

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<sup>13</sup> In *Fisher v. District Court*, 424 U.S. 382 (1976), all parties were tribal members. In *Williams v. Lee*, 358 U.S. 217 (1959), the issue was whether a non-member could make a reservation Indian subject to the jurisdiction of a state court, not whether an Indian could make a non-



Perhaps the language of the second exception was intended to be the start for the development of a doctrine for Indian Tribes which would be analogous to that developed for States in *National League of Cities v. Usery*, 426 U.S. 833 (1976). But the abandonment of that effort for the States in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) certainly cautions against commencing a similar process for Indian Tribes. Indeed, the generality and vagueness of the language used in the second exception reinforces the need for such caution.

What, then, is the source and scope of the exception? We submit that its source can be found in treaty provisions, and that its scope can be determined from decisions applying exactly those same provisions in an analogous context.

We start with the familiar rule that treaty language reserving land for the "exclusive use and benefit" of a tribe — to use the language of the Yakima Treaty — creates an immunity for the Tribe and its members from the reach of State law within the reservation.<sup>14</sup> This treaty-based immunity was first developed in *Worcester* and reaffirmed in *McClanahan*. But there are some narrow exceptions to this immunity. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, at 331-332 (1983). In *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977), for example, the Court held that the State could enforce its conservation regulations directly against tribal members fishing within the reservation, in order to conserve a resource to which non-members were entitled as well. Similarly, in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Court held that State law could require Indian sellers of cigarettes to collect and remit to the State a tax on non-Indian buyers, even though the sales took place on reservation trust land.

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Indian involuntarily subject to the jurisdiction of a tribal court. And in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) and *Thomas v. Gay*, 169 U.S. 264 (1898), the issue was whether a non-Indian government had the power to tax property of a non-Indian located on the reservation; and the power was upheld.

<sup>14</sup> The specific language can vary from treaty to treaty, and in the case of executive order reservations, for which the executive order typically does not use such language at all, the language may be implied.



These results are applications of the more general point made in *Rice v. Rehner*, 463 U.S. 713 (1983), which upheld the power of States to regulate on-reservation sales of liquor by Indians, and which stated, in reversing the Ninth Circuit:

The court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians. *Rice*, 463 U.S. at 725 (Emphasis in original).

The treaty-based immunity, then, is not absolute. If the Indians are in effect destroying the State's ability to govern its own non-Indian citizens, as in *Colville*, or destroying a resource to which those same citizens have a valid claim, as in *Puyallup*, that immunity is not encompassed in the original treaty promise.

Similarly, however, the right of a Tribe to govern its own members, in accordance with the original treaty promise, might well be destroyed if non-Indians are immune from certain provisions of tribal law, even on non-Indian lands. For example, a Tribe might well be able to require a non-Indian retailer, on non-Indian land within the reservation, to collect and pay over a tribal tax imposed upon its members. This would be the mirror-image of the situation in *Colville*. And similarly, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) may be viewed as the mirror-image of *Puyallup*. More generally, just as the promise of tribal self-government contained in the treaty does not provide absolute immunity from all applications of state law to reservation Indians, so too the promise contained in the allotment acts does not provide an absolute immunity from all applications of tribal law to non-Indians on non-Indian lands. But the exceptions parallel each other, in both result and rationale.

Our suggested reading of second exception in *Montana*, then, brings symmetry and a reasonably high degree of certainty into the application of the treaty provisions and the relevant federal statutes. Perhaps even more importantly, it takes into account the nature of the basic problem, *i.e.*, the need to construe two sets of promises, one to Indians and the other to non-Indians, in a manner which best reflects the intent of a Congress which, after making the first, severely eroded it by making the second.

Two final points regarding the scope of the second ex-

ception. As noted in *Montana*, the treaty promise still encompasses a guarantee that the remaining Indian lands within a reservation will be "livable". *Montana*, 450 U.S. at 566, note 15. This guarantee of "livability" may encompass certain rights in addition to the water rights there mentioned. In the instant case, for example, if non-Indian property were to be used in a manner which would make the adjacent Indian property "non-livable", the Tribe or the individual Indian landowner might well have a treaty-based right to abate what would amount to a nuisance, through an action in state or federal court, or to prevent any such uses from arising in the first place, through existing administrative procedures such as those embodied in Yakima County's land use system.<sup>15</sup> Whether the Tribe could, in the absence of any land use regulation at all by the County, enforce the "livability" guarantee by zoning non-Indian land directly is a question not presented here. For the Tribe is here attempting, not to fill a gap created by county inaction, but to grab from the County zoning authority which it has been exercising for many years. Cf. *Montana*, 450 U.S. at 566, note 16.

Second, although our focus so far has been on congressional actions taken many years ago, Congress has not been inactive in the interim. It has conferred upon Tribes a variety of powers over non-Indians, but has done so only after weighing the tribal interests in specific areas and determining that protection of those interests require conferral of such powers. One example is found in *United States v. Mazurie*, 419 U.S. 544 (1975), which upheld the constitutionality of 18 USC §1161, in which Congress delegated to Tribes the authority to regulate the sale and consumption of alcoholic beverages within a reservation, even if the sale or consumption be by non-Indians.

More recent examples are found in the environmental field. Section 518 of the Water Quality Act of 1987, 33 U.S.C. §§ 1251 *et seq.*, sets forth conditions under which certain Tribes may be treated as States for purposes of that Act. See 33 U.S.C. § 1377. The Comprehensive Environmental

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<sup>15</sup> State nuisance and land use laws are, of course, also designed to protect "livability"; and any treaty-based right may thus have little practical independent effect, and be essentially cumulative.

Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* also allows, in §9626, for treatment of Tribes as States for certain purposes. Finally, the Clean Air Act, 42 U.S.C. §7401 *et seq.*, allows Tribes to designate the air quality standards which will be applicable to their reservations. See 42 U.S.C. §7474(c).<sup>16</sup>

In short, Congress is not unwilling to protect tribal interests by conferring authority over non-Indians when the Tribes can make their case. Indeed, if the Court were to completely reject the second exception in *Montana* as representing an initial false step, the political process would still protect those interests when they warrant protection. Cf. *National League of Cities v. Usery*, *supra*, and *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*.

## VI. Practical and Constitutional Considerations.

The reference to "threatened oppression" in Solicitor Margold's second opinion of December 13, 1934, serves as a reminder that important practical and constitutional considerations are here involved. The 20,000 non-Indians who live on the Yakima Reservation cannot participate in the tribal government which is here asserting zoning jurisdiction over them. In addition to there being no political check, there is no judicial check either. Section 10 of the Yakima tribal zoning ordinance makes it clear that no judicial review is available. (J.A. 54) Further, the adequacy of judicial review in a tribal court, even if available, would be subject to serious doubt. See Appendix B to State amicus brief in support of certiorari. (Letter from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, to Senator Daniel K. Inouye, dated January 26, 1988, discussing widespread problems in the administration of tribal legal systems.)

To uphold the power of the Yakima Tribe in this case would result, under these circumstances, in conferring on the Tribe the power to engage in zoning practices which this

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<sup>16</sup> The pattern in these environmental statutes is similar to that envisioned in the original version of the IRA, in that conferral of powers upon the tribal entity would be determined by an administrative agency, which would take into account the special characteristics of each Tribe and its reservation.

Court has found unconstitutional when engaged in by any other unit of government. See *First English Evangelical Church v. Los Angeles County*, 482 U.S. , 107 S. Ct. 2378 (1987). Indeed, the Tribe would have every incentive to use this unfettered power to severely reduce the land values of non-Indian property and force the owners to sell out at these reduced values, and in effect use the zoning power as a cost-less substitute for the power of condemnation.

Further, it must not be overlooked that Indian Tribes, in addition to being governmental units, are often owners of business enterprises as well, just as the final version of the IRA intended them to be. See pp. 15-16, *supra*. In those cases in which there are competing non-Indian business enterprises within the reservation, there will again be every incentive to use its governmental power over those non-Indian businesses to the advantage of its own.<sup>17</sup> In short, to uphold the claim of tribal zoning power in this case is to create exactly the types of conflicts which so concerned Senator Wheeler and which led to the rejection of the original version of the IRA.

To uphold that claim would raise important constitutional issues as well. Indeed, the practical and the constitutional considerations are inevitably linked. We are not suggesting that the constitutional issues require final resolution here; but they certainly form a "backdrop" which is no less important in construing relevant treaties and statutes, than the backdrop of tribal sovereignty. Cf. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 172 (1973).

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<sup>17</sup> A situation on the Colville Reservation in Washington illustrates the potential problem. A tribally owned forest products business is in competition with a similar non-Indian business located on fee land, and the Tribe is attempting to exert regulatory authority over that non-Indian business. See *Colville Confederated Tribes v. Cavenham Forest Industries, Inc.*, 14 Ind. L. Rptr 6043 (Colville Tribal Ct., Nov. 16, 1987) (issuing preliminary injunction requiring Cavenham to submit to tribal zoning authority). The case is now on appeal. (Colville Ct. of App. No. CV-87-751)

The Environmental Protection Agency, it should be noted, has recognized the potential conflict of interest between a Tribe as regulator and the same Tribe as one of the regulated parties under various federal environmental statutes, and is attempting to provide safeguards. See, e.g., 52 Fed. Reg. 46712, (Dec. 9, 1987) at 46714. (Proposed rule). Such safeguards are not available, of course, when jurisdiction over non-Indians is based upon some sort of inherent tribal authority, such as the zoning authority here claimed by the Yakima Tribe.



Tribal governments are not subject to the Bill of Rights, which governs the conduct of the Federal Government, or to the Fourteenth Amendment, which governs that of the States and its political subdivisions. *Talton v. Mayes*, 163 U.S. 376 (1896). This is because Indian Tribes, unlike political subdivisions of a State, do not exercise power delegated by a superior sovereign. *United States v. Wheeler*, 435 U.S. 313 (1978).

But if, as we submit, the ultimate controlling factor in this case is congressional intent, the Bill of Rights surely controls the permissible scope of that intent. And this gives rise to an obvious problem. How can it be permissible for Congress to intend — and thereby bring about — a system of government which itself would surely be constitutionally impermissible to the extent that non-Indians who are subject to it cannot possibly participate in it, through the voting franchise or otherwise?

*Talton v. Mayes*, *supra*, shields tribal governments from the Bill of Rights; but it does not shield the Congress.<sup>18</sup> Further, it is not just a question of Congress tolerating the continued existence of tribal governments through inaction. If tribal governments are to be true governments, recognizable as such by the federal courts, they must first be recognized as such by the Congress, in a treaty or statute, or by the Executive pursuant to congressional authority. Absent congressional action, the problem does not even arise. And that fact is itself a large part of the problem. In the final analysis, the Tribes have governmental powers only to the extent that Congress so wills. That, after all, is why the extent of these powers is always a federal question. *Cf. National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).<sup>19</sup>

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<sup>18</sup> The applicability of the Constitution to the congressional exercise of its treaty-making power with the Indians, and the constitutional difficulties in a broad grant of tribal jurisdiction over non-Indians, were recognized by the Attorney General of the United States 150 years ago. See 2 Op. Atty. Gen. 693 at 694 (1834).

<sup>19</sup> The close relationship between the United States and Indian Tribes is strikingly illustrated by an event described by Commissioner Collier to show the need for greater tribal autonomy, as proposed in the Department's original bill:

In January 1923, when it had already become known that there



This constitutional issue is really a form of the familiar "state action" issue. Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). That issue becomes more acute as the Tribe lays claim to the broad powers typically associated with general purpose governments, such as zoning, taxation, and general police power regulation. Compare *Kramer v. Union Free School District*, 395 U.S. 621 (1969) and *Cipriano v. Houma*, 395 U.S. 701 (1969) with *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Cf. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

So long as tribal powers over non-Indians remain confined to those which Congress has expressly delegated — as in the fields of liquor and environmental regulation, discussed above (pp. 23-24 *supra*) — and to those based upon a narrow reading of the *Montana* exceptions (pp. 21-22, *supra*), exclusion of non-Indians from any role in tribal government may well be justified. But any expansion beyond those limits can be constitutionally justified only if there is as well a parallel expansion of the right to participate in that government.

The Tribe, in short, cannot have it both ways. It cannot justify exclusion of non-Indians from participation, on the grounds that tribal *self*-government justifies that exclusion, while at the same time laying claim to broad powers over those non-Indians.

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was great oil wealth on the Navajo Reservation, the Secretary of the Interior by one fiat smashed the Navajo tribal government. It ceased to exist \* \* \* He wiped it out and he dictated a new Navajo tribal council.

1934 House Hearings at 37.

**CONCLUSION**

For the reasons given above, the judgments of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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## APPENDIX A

[H. R. 7902, 73d Cong., 2d sess.]

A BILL To grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise; to provide for the necessary training of Indians in administrative and economic affairs; to conserve and develop Indian lands; and to promote the more effective administration of justice in matters affecting Indian tribes and communities by establishing a Federal Court of Indian Affairs.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### TITLE I — INDIAN SELF-GOVERNMENT

SECTION 1. That it is hereby declared to be the policy of Congress to grant to those Indians living under Federal tutelage and control the freedom to organize for the purposes of local self-government and economic enterprise, to the end that civil liberty, political responsibility, and economic independence shall be achieved among the Indian peoples of the United States, and to provide for cooperation between the Federal Government, the States, and organized Indian communities for Indian welfare. It is further declared to be the policy of Congress that those functions of government now exercised over Indian reservations by the Federal Government through the Department of the Interior and the Office of Indian Affairs shall be gradually relinquished and transferred to the Indians of such reservations, duly organized for municipal and other purposes, as the ability of such Indians to administer the institutions and functions of representative government shall be demonstrated, and that those powers of control over Indian funds and assets now vested in officials of the Federal Government shall be terminated or transferred to the duly constituted governments of local Indians communities as the capacity of the Indians concerned, to manage their own economic affairs prudently and effectively, shall be demonstrated. It is further declared to be

the policy of Congress to assist in the development of Indian capacities for self-government and economic competence by providing for the necessary training of Indians, and by rendering financial assistance and cooperation in establishing Indian communities.

SEC. 2. In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to issue to the Indians residing upon any Indian reservation or reservations or subdivision thereof a charter granting to the said community group any or all of such powers of government and such privileges of corporate organization and economic activity, hereinafter enumerated, as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned; but no such charter shall take effect until ratified by a three-fifths vote at a popular election open to all adult Indians resident within the territory covered by the charter.

Upon receipt of a petition for the issuance of a charter signed by one fourth of the adult Indians residing on any existing reservations, it shall be the duty of the Secretary of the Interior to make the necessary investigations and issue a proper charter, subject to ratification, or shall proclaim the conditions upon which such charter will be issued; and such petition, with a record of the findings and of the action of the Secretary, shall be transmitted by the Secretary of the Interior to Congress: *Provided*, That whenever the Secretary of the Interior shall acquire land not comprised within any existing reservation for the purchase of establishing a new Indian community, pursuant to the authority granted by title III of this Act, he shall issue a charter to take effect at some future time and shall therein prescribe the conditions under which persons of at least one-fourth degree of Indian blood shall be entitled to become members of such community, and the acceptance of such membership by the qualified persons shall constitute an acceptance and ratification of such charter.

SEC. 3. Each charter issued to an Indian community shall define the territorial limits of the community and the criteria of membership within the community; shall, wherever such community is sufficiently populous and endowed

with sufficient territory to make the establishment of local government possible, prescribe a form of government adapted to the needs, traditions, and experience of such community; and shall guarantee the civil liberties of minorities and individuals within the community, including the liberty of conscience, worship, speech, press, assembly, and association, and the right of any member to abandon the community and to receive some compensation for any interest in community assets thereby relinquished, the extent of which compensation and the manner of payment thereof to be fixed by charter provision. Each charter shall further specify the powers of self-government to be exercised by the chartered community, and shall provide for the planned extension of these powers as the community offers evidence of capacity to administer them. Each charter shall likewise prescribe the powers of management or supervision to be exercised by the chartered community over presently restricted real and personal property of individual Indians or tribes, and shall provide for the bonding of any community officials or Federal employees entrusted with the custody of community funds and for such forms of publicity and accounting, and for such continuing supervision by the Office of Indian Affairs over financial transactions and economic policies as may be found by the Secretary of the Interior to be necessary to prevent dissipation of the capital resources of the community or unjust discrimination in the apportionment of income; and each charter shall further provide for the gradual elimination of administrative supervision as the Indian community shows progress in the effective utilization of its resources and the prudent disposal of its assets.

SES. 4. The Secretary of the Interior is authorized to grant to any community which may be chartered under this Act, either by original charter or by supplement to such charter initiated or ratified by a three fourths vote, any or all of the powers hereinafter enumerated, subject to the provisions of law fixed by section 8 of this title, or any rules or regulations promulgated pursuant thereto, respecting the terms upon which certain functions of the Federal Government shall be transferred to the chartered



community, and to provide, in such original charter or supplement, for the definition, qualification, or limitation of any powers which may be granted, in any manner deemed necessary or desirable for the effectuation of the purposes and policies above set forth.

(a) To organize and act as a Federal municipal corporation, to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate and enforce ordinances and regulations for the effectuation of the functions hereafter specified, and any other functions customarily exercised by local governments.

(b) To elect or appoint officers, agents, and employees, to define the qualifications for office, to fix the salaries of officials to be paid by the community, to prescribe the qualifications of voters, to define the conditions of membership within the community, and to provide for the adoption of new members.

(c) To regulate the use and disposition of property by members of the community, to protect and conserve the property, wild life, and natural resources of the community, to cultivate and encourage arts, crafts, and culture, to administer charity, and to protect the health, morals, and general welfare of the members of the community.

(d) To establish courts for the enforcement and administration of ordinances of the community, which courts shall have exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or nonexclusive over all other cases arising under the ordinances of the community, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding \$500, or, in the alternative, by imprisonment for a period not exceeding six months: *Provided*, That no person shall be punished for any offense for which prosecution has been begun in any other court of competent jurisdiction.

(e) To accept the surrender of the tribal, corporate, or community, interests of individual members who desire to abandon the community, and to pay a fair compensation

therefor, to act as guardian or to provide for the appointment of guardians for minor and other incompetent members of the community, and to administer tribal and individual funds and properties which may be transferred or entrusted to the community by the Federal Government.

(f) To operate, maintain, and equip any public improvement and, as a Federal agency, to condemn and take title to any lands or properties, in its own name, when necessary for any of the purposes authorized by charter, and to levy assessments for community purposes, or to require the performance of labor on community projects, in lieu of assessments.

(g) To acquire, manage, and dispose of property, subject to applicable laws restricting the alienation of Indian lands and the dissipation of Indian resources, to make contracts, to issue nontransferable certificates of membership, to declare and pay out dividends, to adopt and use a corporate seal which shall be judicially noticed in all Federal courts, to sue and be sued in its own name, to employ counsel and to pay counsel fees not in excess limits to be fixed by charter provision, to have succession until its membership may become extinct, and to exercise any other privileges which may be granted to membership or business corporations.

(h) To compel the transfer from the community for inefficiency in office or other cause, of any employee of the Federal Indian Service locally assigned; to regulate trade and intercourse between members of the community and nonmembers; and to exclude from the territory of the community, with the approval of the Secretary of the Interior, nonmembers whose presence endangers the health, security, or welfare of the community: *Provided, however,* That nothing in this section or in this Act shall be construed to forbid the service in the territory of any Indian community of any civil or criminal process of any court having jurisdiction over any person found therein.

(i) To exercise any other power now or hereafter delegated to the Office of Indian Affairs, or any officials thereof, to contract with governmental bodies of State or Nation for the reception or performance of public services,

and to act in general as a Federal agency in the administration of Indian Affairs, upon the condition, however, that the United States shall not be liable for any act done, suffered to be done, or omitted to be done by a chartered Indian community.

(j) To exercise any other powers, not inconsistent with the Constitution and laws of the United States, which may be necessary or incidental to the execution of the powers above enumerated.

An Indian community chartered under this Act shall be recognized as successor to any existing political powers heretofore exercised over the members of such community by any tribal, or other native political organizations comprised within the said community, not withheld by such tribal or other native political organization, and shall, subject to the terms of said charter, further be recognized as successor to all right, interest, and title to all funds, property, choses in action, and claims against the United States heretofore held by the tribes or other native political organizations comprised within the community, or to a proportionate share thereof, except as such succession may be limited by the charter, subject to existing provisions of law with respect to the maintenance of suits against the United States, and subject further to such provision for the apportionment of such assets among nonmembers of the community having vested rights therein, as may be prescribed by the charter.

SEC. 5. When any Indian community shall have been chartered, it shall be the duty of the Commissioner of Indian Affairs to cause regular reports concerning their respective functions to be made to the constituted authorities of the community, to advise and consult with such authorities on problems of local administration and Federal policy, and to allow such authorities free access to the records and files of the local agency.

Any Indian community shall have the power to compel the transfer from the community of any persons employed in the administration of Indian affairs within the territorial limits of the community other than persons appointed by the community: *Provided, however, That the Commis-*

sioner of Indian Affairs may prescribe such conditions for the exercise of this power as will assure to employees of the Indian Service a reasonable security of tenure, an opportunity to demonstrate their capacities over a stated period of time, and an opportunity to hear and answer complaints and charges.

SEC. 6. The Secretary shall prepare annual estimates of expenditures for the administration of Indian affairs, including expenditures for functions and services administered by an Indian community, pursuant to the authority conferred by section 8 of this title. It shall be the duty of the Secretary to transmit to the authorized representative of an Indian community any estimates and justifications thereof for expenditures to be made in whole or in part within the territorial limits of the community. Any recommendation of the authorized representatives of the community, including the approval or rejection of any item in whole or in part, or the recommendation of any other expenditures, shall be transmitted by the Secretary to the Bureau of the Budget and to the Congress concurrently with the submission of the estimates of the Secretary.

The Secretary shall also transmit to the authorized representatives of an Indian community a copy of any bill, or amendment of a bill, for the benefit of Indians, authorizing in whole or in part, the appropriation or expenditure, within the territorial limits of such community, of any funds from the Federal Treasury for which the Secretary of the Interior has submitted no estimates, and the Secretary shall transmit their written recommendations to the Congress.

The Secretary shall also transmit to the authorized representatives of an Indian community a description of any project involving the expenditure, in whole or in part, of any funds appropriated for the general welfare within the territorial limits of the community.

No expenditure hereafter authorized or appropriated for by Congress shall be charged against any such Indian community as a reimbursable debt, unless such appropriation and expenditure have been recommended or approved by such Indian community through its duly constituted au-



thorities; and any funds of the community deposited in the United States Treasury shall be expended only by the bonded disbursing agent of such community.

SEC. 7. The Secretary of the Interior may from time to time delegate to any Indian community, within the limits of its competence as defined by charter, the authority to perform any act, service, or function which the United States administers for the benefit of Indians within the territorial limits of the community and may enter into annual agreements with the constituted authorities of the community with respect to the terms and conditions of such delegation.

SEC. 8. The Commissioner is authorized and directed to proceed immediately after the passage of this Act, to arrange and classify the various functions and services administered for Indians by the United States into divisions and subdivisions which may be separably transferred. The Commissioner is further authorized and directed to proceed, immediately after the passage of this Act, to make a study and investigation of the conditions upon which separable functions and services may be transferred to the Indian communities and thereupon to promulgate, direct, and express rules and regulations to govern such transfer.

The said rules and regulations shall set forth all conditions reasonably necessary to assure the satisfactory and continued administration of the function or service transferred. The said rules and regulations shall include standards of fitness for Indians with respect to health, age, character, knowledge, and ability, for any position maintained, now or hereafter, before or after transfer to an Indian community, for the administration of functions or services within the territorial limits of any community, and a classification of all positions for which the requisite knowledge and training may be acquired by Indians through experience or apprenticeship in the position. The said rules and regulations shall also set forth for each separable function or services, a condition of its transfer, the positions for which Indians shall qualify and the required number of qualified Indians for each such position, provisions assuring a reasonable security of tenure, and any



other conditions reasonably necessary to assure the continued and the satisfactory administration of transferred functions or services.

Any Indian community may, through procedure set up in its charter, appoint a member to any vacant position under the Indian Service maintained for the administration of functions or services for Indians within the territorial limits of the community. The appointee shall not take office until he shall have previously received the certificate of approval of his fitness for the position in question from the Commissioner. The Commissioner shall issue such certificate of approval to any member of an Indian community recommended by the duly authorized representatives of the community and who is qualified for the position under the rules and regulations prescribed pursuant to this section.

Any Indian community may, upon a three-fourths vote at a popular election open to all adult members, request the transfer of any separable function or service, and the Secretary of the Interior shall transfer such function or service and, if necessary, confer by supplement to the community charter, the legal capacity to exercise such function or service, subject only to the following terms and conditions;

(a) The community must comply with all conditions prescribed by the rules and regulations of the Secretary of the Interior pursuant to the authority of this section. The community may transmit to the Congress any objection it may have to the conditions imposed, together with its budget recommendations for the next fiscal year.

(b) The Secretary of the Interior shall certify to the Secretary of the Treasury the amount of any sums or any unexpended balance of such sums theretofore or thereafter expressly appropriated, or the proportionate share of any general appropriation, for the administration of such function or service within the territorial limits of the community. The Secretary of the Treasury shall place such sums to the credit of the community, to be paid out on the requisition of the bonded disbursing agent of the community. The expenditure of such funds shall be subject to all Fed-

eral laws and regulations governing the expenditures of Federal appropriations.

(c) The Commissioner shall aid and advise the community, and the local Federal employees shall cooperate in any feasible manner at the request of the community, in the administration of the function or service transferred. The Commissioner shall also make available to the Indian community any facilities, including any lands, buildings, and equipment previously used but no longer needed by the United States in the administration of Indian affairs within the community.

(d) Whenever the Secretary of the Interior shall determine that the community has failed to comply with the conditions imposed for the continued administration of the function or service transferred, the Secretary or the Commissioner of Indian Affairs shall reassume the administration of such function or service and the Secretary shall report to the next regular session of the Congress with appropriate recommendations.

(e) The community, or its duly authorized representatives, shall make on or before September 1 of each year, an annual report for the fiscal year ended June 30, previously, to the Secretary, concerning the administration of the function or service transferred to the community, including an account by the disbursing agent of the community of receipts and expenditures of moneys placed to the credit of the community under this section.

(f) The Secretary of the Interior shall make an annual report to Congress on the administration of the functions and services transferred to the community, and shall include in such reports the reports of the Indian communities required by paragraph (e) of this section.

SEC. 9. The Secretary and the Commissioner shall continue to exercise all existing powers of supervision and control over Indian affairs now entrusted to them or either of them which are not transferred by charter or supplement thereto or by Act of Congress to organized Indian communities, and shall have power to enforce by administrative order or veto, if so provided within the charter, or, in any event, by legal process in any court of competent

jurisdiction, all provisions contained in a charter for the protection of the rights of minorities within the community, all provisions therein contained for the conservation of the resources of the community, and all other provisions that limit, qualify, or restrict the powers granted to the community.

SEC. 10. The Secretary of the Interior may, upon granting a charter to an Indian community, convey or confirm to such community, as an agency of the Federal Government, any right, interest, or title in property which may be held by the United States in trust for members of the community, and in any lands, buildings, or equipment previously used by the United States in the administration of Indian affairs within the community, and in any liens or credits of the United States held by virtue of loans to or expenditures on behalf of Indian members of the said community.

SEC. 11. Nothing in this Act shall be construed as rendering the property of any Indian community or of any member of such community subject to taxation by any State or subdivision thereof, or subject to attachment or sale under legal process, or as an expression of intent on the part of the United States to abandon the duties and responsibilities of guardianship of any Indians becoming members of chartered communities.

SEC. 12. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, not to exceed \$500,000 in any one fiscal year, to be expended at the order of the Secretary of the Interior, and with the consent of the Indian communities concerned, in defraying the expenses of the organization and development of communities chartered under this Act, including the construction and furnishing of community buildings, the purchase of clerical supplies, and the improvement of community lands.

SEC. 13. The following definitions of terms used in this title shall be binding in the interpretation of this statute:

(a) The term "Commissioner" whenever used in this Act shall be taken to refer to the Commissioner of Indian Affairs, and the term "Secretary" to the Secretary of the In-

terior, and the terms "Commissioner" and "Secretary" whenever used in this Act in reference to the exercise of any power shall be construed as authorizing the delegation of such power to subordinate officials.

(b) The term "Indian" as used in this title to specify the persons to whom charters may be issued, shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one fourth or more Indian blood, but nothing in this definition or in this Act shall prevent the Secretary of the Interior or the constituted authorities of a chartered community from prescribing, by provision of charter or pursuant thereto, additional qualifications or conditions for membership in any chartered community, or from offering the privileges of membership therein to nonresidents of a community who are members of any tribe, wholly or partly comprised within the chartered community.

(c) The term "residing upon any Indian reservation" as used in this title to specify the persons to whom charters may be issued shall signify the maintaining of a permanent abode at the time of the issuance of a charter and for a continuous period of at least one year prior to February 1, 1934, and subsequent to September 1, 1932, but this definition may be modified by the Secretary of the Interior with respect to Indians who may reside on lands acquired subsequently to February 1, 1934.

(d) The term "charter" is used in this Act shall denote any grant of power by the United States, whether or not such power includes the privilege of corporate existence.

(e) The "three-fifths vote" required for ratification of a charter and the "three-fourths vote" required for proposal or ratification of any supplement thereto or transfer of any Federal function or service shall be measured with reference to the total number of votes cast; the chartered community, or, if the community has not yet been chartered, the Secretary of the Interior shall designate the time, place



and manner of voting, shall declare the qualifications of voters, and shall be the final judge of the eligibility of voters and of the validity of ballots.

(f) The term "disposition of property" as used in this title shall denote any transfer of property by devise or intestate succession, as well as transfer inter vivos.

(g) The term "punish" as used in this title shall not be construed to affect the amount or extent of civil judgments.

(h) The term "public" as used in this title shall include all matters affecting either the property owned or controlled by a chartered community, or the health, morals, or welfare of a considerable part of the membership of such community.

(i) The term "dividend" as used in this title shall be construed to include any distribution of funds by a chartered community out of current or accrued income and any other distribution of funds which may be approved by the Secretary of the Interior.

(j) The power "to sue and be sued" as used in this title shall not be construed to grant to the courts of any State any jurisdiction over a chartered community or the members thereof not now possessed over an Indian tribe or its members, nor to sanction execution upon the assets of the community, nor shall this power be construed to deny the right of the United States to intervene in any suit or proceeding in which it now has the right to intervene.

(k) The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

(l) The term "reservation" wherever used in this Act shall be construed to comprise all the territory within the outer boundaries of any Indian reservation, whether or not such property is subject to restrictions on alienation and whether or not such land is under Indian ownership.

(m) The term "territory of a chartered community" wherever used in this Act shall be construed to comprise all lands, waters, highways, roads, and bridges within the boundaries of an Indian community as fixed by charter, regardless of whether the title to such property is in the



United States, an Indian tribe or community, a restricted Indian or the heirs of a restricted Indian, or whether it is in a fee-patent Indian, or any other person, agency, or government.

(n) The term "transfer" as used in this title to apply to any function or service shall designate the relinquishment by the Secretary of the Interior or the Commissioner of Indian Affairs of any rights and duties incident to the performance of such function or service and the assumption of such rights and duties by the Indian community as an agency of the Federal Government.

## TITLE II — SPECIAL EDUCATION FOR INDIANS

SECTION 1. The Commissioner is authorized and directed to make suitable provision for the training of Indian members of chartered communities and other Indians of at least one-fourth degree of Indian blood, in the various services now intrusted to the Office of Indian Affairs and in any additional services which may be undertaken by a chartered Indian community, including education, public-health work, and other social services, the administration of law and order, the management of forests and grazing lands, the keeping of financial accounts, statistical records, and other public reports, and the construction and maintenance of buildings, roads, and other public works. The Commissioner may use the staffs and facilities of existing Indian boarding or day schools for such special instruction, and he may provide for the training and education of Indian students in universities, colleges, schools of medicine, law, engineering, or agriculture, or other institutions of recognized standing and may subsidize such training and education under the following conditions:

(a) The Commissioner shall extend financial aid and assistance on the basis of financial need to qualified Indians for the payment of tuition and other costs of education, including necessary costs of support. One half of the amount so expended shall be a non-interest-bearing, reimbursable loan to be repaid in installments whenever the beneficiary shall have received employment anywhere, but

the obligation shall be temporarily suspended during any period of unemployment.

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed \$50,000 annually to defray subsidies made under the foregoing paragraph.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Commissioner may grant scholarships to any qualified Indian of special promise, no part of which shall be reimbursable.

There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed \$15,000 annually to defray the cost of scholarships awarded under the foregoing paragraph.

Formal contracts shall not be required for compliance with section 3744 of the Revised Statutes (U.S.C., title 11, sec. 16), with respect to the grants of subsidies or scholarships to Indian students under the foregoing provisions.

SEC. 2. It is hereby declared to be the purpose and policy of Congress to promote the study of Indian civilization and preserve and develop the special cultural contributions and achievements of such civilization, including Indian arts, crafts, skills, and traditions. The Commissioner is directed to prepare curricula for Indian schools adapted to the needs and capacities of Indian students, including courses in Indian history, Indian arts and crafts, the social and economic problems of the Indians, and the history and problems of the Indian Administration. The Commissioner is authorized to employ individuals familiar with Indian culture and with the contemporary social and economic problems of the Indians to instruct in schools maintained for Indians. The Commissioner is further directed to make available the facilities of the Indian schools to competent individuals appointed or employed by an Indian community to instruct the elementary and secondary grades in the Indian arts, crafts, skills, and traditions. The Commissioner may contribute to the compensation of such individuals in such proportion and upon such terms and conditions as he may deem advisable. For this purpose the

Commissioner may use moneys appropriated for the maintenance of such schools.

### TITLE III — INDIAN LANDS

SECTION 1: It is hereby declared to be the policy of Congress to undertake a constructive program of Indian land use and economic development, in order to establish a permanent basis of self-support for Indians living under Federal tutelage; to reassert the obligations of guardianship where such obligations have been improvidently relaxed; to encourage the effective utilization of Indian lands and resources by Indian tribes, cooperative associations, and chartered communities; to safeguard Indian lands against alienation from Indian ownership and against physical deterioration; and to provide land needed for landless Indians and for the consolidation of Indian landholdings in suitable economic units.

SEC. 2. Hereafter no tribal or other land of any Indian reservation or community created or set apart by treaty or agreement with the Indians, act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 3. The Secretary of the Interior is authorized to withdraw from disposal the remaining surplus lands of any Indian reservation heretofore opened or authorized to be opened, to sale, settlement, entry, or other form of disposal by Presidential proclamation, or under any of the public land laws of the United States. Any land so withdrawn shall have the status of tribal or community lands of the tribe, reservation, or community within whose territorial limits they are located: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act.

The Secretary of the Interior shall determine what lands, lying outside of areas classified for consolidation under Indian ownership pursuant to section 6 of this title, are not needed by the Indians, and such lands shall be reopened to sale, settlement, entry, or other lawful form of disposal in accordance with existing law.

SEC. 4. The existing periods of trust placed upon Indian allotments and unallotted tribal lands and any restriction of alienation thereof, are hereby extended and continued until otherwise directed by Congress. The authority of the Secretary of the Interior to issue to Indians patents in fee or certificates of competency or otherwise to remove the restrictions on lands allotted to individual Indians under any law or treaty is hereby revoked.

No lands or other capital assets owned by an Indian community, or any interest therein, shall be voluntarily or involuntarily alienated: *Provided, however,* That the community may grant the use of the surface of, or any mining privileges in, any land to a nonmember, by lease or revocable permit for a period not to exceed one year, or, with the approval of the Secretary, for a longer period, and may, with the approval of the Secretary, sell or contract to sell to a nonmember any standing timber, or dispose of any capital improvements, owned by the community.

SEC. 5. No sale, devise, gift, or other transfer of Indian lands held under any trust patent or otherwise restricted, whether in the name of the allottee or his heirs, shall be made or approved: *Provided, however,* That such lands may, with the approval of the Secretary, be sold, devised, or otherwise transferred to the Indian tribe from whose lands the allotment was made or the chartered community within whose territorial limits they are located: *And provided further,* That the Secretary of the Interior may authorize exchanges or lands of equal value whenever such exchange is in his judgment necessary for or compatible with the proper consolidation of Indian lands classified for the purpose pursuant to the authority of section 6 of this title.

SEC. 6. The Secretary of the Interior is authorized and directed to classify areas of land allotted in whole or in part now under restricted Indian ownership which are reasonably capable of consolidation into suitable units for grazing, forest management, or other economic purposes, and to proclaim the exclusion from such areas of any lands not to be included therein. In order to bring about an orderly and sound acquisition and consolidation of lands and



to promote the effective use of Indian resources and the development of Indian economic capacities, the Secretary is hereby authorized and directed to make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals; to make necessary maps and surveys; to investigate Indian aptitudes and needs in the agricultural and industrial arts, in political and social affairs and in education, and to make such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands. In carrying out the investigations prescribed in this section the Secretary is authorized to utilize the services of any Federal officers or employees that the President may assign to him for the purpose, and is further authorized, with the consent of the States concerned, to enter into cooperative agreements with State agencies for similar services.

SEC. 7. The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to acquire, through purchase, relinquishment, gift, exchange, or assignment, lands or surface rights to lands, within or outside of existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians for whom reservation or other land is not now available and who can make beneficial use thereof, and for the purpose of blocking out and consolidating areas classified for the purpose pursuant to the authority of section 6 of this title. The Secretary is authorized, in the case of trust or other restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel the patent or patents or any other instrument removing restrictions from the land.

There is hereby authorized to be appropriated, for the acquisition of such lands and for expenses incident thereto, including appraisals and the investigations provided for in section 6 of this title, a sum not to exceed



\$2,000,000 for any one fiscal year. The unexpended balances of appropriations made for any one year pursuant to this Act shall remain available until expended.

The Secretary of the Interior is hereby authorized to accept voluntary relinquishments from any Indian allottee or Indian homestead entryman, or from his heirs, of all rights in and to any land included in any Indian public domain allotment, homestead, or application therefor, which has heretofore or may hereafter be made, where such land lies within the exterior boundaries of any Indian reservation or area heretofore or hereafter set apart and reserved for the use and benefit of any Indian tribe or band; and the Secretary of the Interior is hereby authorized and empowered to cancel any patent which may have been issued conveying such land, or any interest therein, to any Indian allottee or Indian homestead entryman.

Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, but title may be transferred by the Secretary to such community under the conditions set forth in this Act.

SEC. 8. Any Indian tribe or chartered Indian community is authorized to purchase or otherwise acquire any interest of any member or nonmember in land within its territorial limits, and may expend any tribal or community funds, whether or not held in the Treasury of the United States, for this purpose, whenever, in the opinion of the Secretary of the Interior the acquisition is necessary for the proper consolidation of Indian lands.

The Secretary of the Interior is authorized to transfer to any Indian tribe or community, and to accept on behalf of the tribe or community, any member's interest in restricted farming, grazing, or timberlands, and shall issue a non-transferable certificate in exchange, evidencing a proportionate interest in tribal or community lands of similar quality, if in his opinion such transfer is necessary for the proper consolidation of Indian lands: *Provided, however,* That any Indian making beneficial use of such transferred lands shall be entitled to continue the occupancy and use

of such lands, and to any improvements thereon, or to receive adequate compensation for such improvements, subject to the provisions of section 14 of this title. For the purpose of this section "proportionate interest" shall be construed to mean a right to use or to receive the income from an equivalent amount of tribal or community land of similar quality or to receive the money value of any lawful disposition of the interest transferred if such right of use is not exercised. A member's proportionate interest may descend to the heirs of such member but not to any nonmember, and his right of use of transferred land, if exercised, may similarly descend to the heirs of such member.

The Secretary of the Interior may sell and convey to an Indian, to an Indian tribe, or community, any restricted lands inherited by any member, whenever, in his opinion, the sale is necessary for the proper consolidation of Indian lands.

The time and mode of payment of the purchase price of any lands authorized to be sold or purchased under this section shall be governed by the agreement between the parties, but insofar as practicable the purchase price shall be paid in annual installments equal to the estimated annual proceeds realizable from any lawful disposition of the land, and the vendor, if a member, may accept any right of use in tribal or community lands as satisfaction of the purchase price in whole or in part.

SEC. 9. The Secretary of the Interior shall assign the use of tribal or community lands to any member according to the right or interest of such member for a period not to exceed the life of the assignee and shall make rules and regulations governing such assignments. The Secretary of the Interior may in addition assign to any such member the right of exclusive occupancy of any community lands for farming or domestic purposes in proper economic units: *Provided*, That any Indian making beneficial use of land shall be entitled to preference in the assignment of the use of such land and to any improvements thereon or to adequate compensation for such improvements.

All rights of exclusive occupancy of, and all physical improvements lawfully erected on, tribal or community

lands, shall descend according to rules of descent and distribution to be prescribed by the Secretary of the Interior.

SEC. 10. Wherever the Secretary shall find that existing State laws governing the determination of heirs, so far as made applicable to any restricted Indian lands by congressional enactment, are not adapted to Indian needs and circumstances, he may promulgate independent rules governing such determination, including such rules as may be necessary to prevent any subdivision of rights to lands or improvements thereon where is likely to impair their beneficial use.

The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 11. On and after the effective date of the passage of this Act, and beginning with the death of the person presently entitled, all right, interest, and title in restricted allotted lands, but not including any proportionate interest acquired pursuant to section 8 of this title or any improvements lawfully erected, shall pass to the chartered community within whose territorial limits such lands are located or, if no community has been chartered, to the tribe from whose lands the allotment was made: *Provided, however,* That individuals who would be otherwise entitled, save for the provisions of this section, shall acquire a contingent interest in such lands, and title to any such lands shall vest in such individuals when and only when the Secretary shall determine that such lands lie outside any area classified for consolidation pursuant to section 6: *And provided further,* That prior to such determination the individuals otherwise entitled shall enjoy the use and income realized from any lawful disposition of such lands.

The Secretary shall issue to the individuals otherwise entitled to nontransferable certificate evidencing a descendible interest in tribal or community lands of similar quality in the proportion which the acreage of the farming grazing, or timber lands, whichever, passing to the tribe or community at any time bears to the total tribal or community acreage of farming, grazing, or timber lands: *Provided, however,* That such persons shall enjoy a preference in the assignment of lands passing to the tribe or community in

accordance with the provisions of this section.

No will purporting to make any other disposition of such lands shall be approved.

SEC. 12. The Secretary of the Interior is authorized and directed to issue to each member of an Indian tribe or community which owns or controls lands allotted in whole or in part a nontransferable certificate evidencing the member's right to an equal interest in all tribal or community assets, including the right to make beneficial use of a proportionate share thereof: *Provided, however,* That in the administration of sections 8, 9, 10, and 11 of this title, members so entitled may be given the right to actual beneficial use of more than their proportionate shares of such tribal or community lands and resources: *And provided further,* That in the administration of sections 8, 9, 10 and 11 of this title, appropriate deductions may be made from the undivided interest of any member proportionate in value to any special interest acquired or inherited by such member, in exchange for property passing, transferred, or sold, to a tribe or community, or any restricted lands retained in severalty by such member.

SEC. 13. Each certificate issued pursuant to the authority of any section of this title shall be issued in triplicate, one copy of which the Secretary of the Interior shall retain in a register to be kept for the purpose and the others of which he shall forward to the tribe or chartered Indian community. The said tribe or community shall deliver to the Indian in whose favor it is issued one of such certificates so forwarded and shall cause the other to be copied into a register of the tribe or community to be provided for the purpose, and shall file the same.

The Secretary may delegate to a chartered community the authority conferred by this section and may countersign certificates of interest issued by such community to its members.

SEC. 14. The Secretary of the Interior is authorized and directed to classify and divide the lands owned or controlled by an Indian tribe or community into economic units suitable for farming, grazing, forestry, and other purposes, and may lease or permit the use of, and may regu-



late the use and management of such lands whenever in his opinion necessary to promote and preserve their economic use. The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 15. The Secretary of the Interior is authorized and directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range for deterioration, to prevent soil erosion, and like purposes. The Secretary may delegate to a chartered Indian community the authority conferred by this section.

SEC. 16. The Secretary of the Interior is authorized to proclaim new Indian reservations on lands purchased for the purposes enumerated in this Act, or to add such lands to the jurisdiction of existing reservations. Such lands, so long as title to them is held by the United States or by an Indian tribe or community, shall not be subject to taxation, but the United States shall assume all governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities to persons residing thereon, and the execution of proper measures for the control of fires, floods, and erosion, and the protection of the public health and order in such lands, and the Secretary of the Interior may enter into agreements with authorities of any State or subdivision thereof in which such lands are situated for the performance of any or all of the foregoing functions by such State or subdivision or any agencies or employees thereof authorized by the law of the State to enter into such agreements, and for the payment of the expenses of such functions where appropriations therefor shall be made by Congress.

SEC. 17. Nothing contained in this title shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic



boundaries of any Indian reservation now existing or to be established hereafter.

SEC. 18. Whenever used in this title the phrase "a member of an Indian tribe" shall include any descendant of a member permanently residing within an existing Indian reservation.

SEC. 19. Whenever used in this title the phrase "lands owned or controlled by an Indian tribe or community" shall include all interest in land of any of its members.

SEC. 20. The provisions of this Act shall not be construed to prevent the removal of restrictions on taxable lands of members of the Five Civilized Tribes nor operate to effect any change in the present laws and procedure relating to the guardianship of minor and incompetent members of the Osage and Five Civilized Tribes, but in all other respects shall apply to such Indians.

SEC. 21. None of the provisions of this Act, except the provisions of Title II, relating to Indian education, shall apply to the Indians of New York State.

#### TITLE IV — COURT OF INDIAN AFFAIRS

SECTION 1. There shall be a United States Court of Indian Affairs, which shall consist of a chief judge and six associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive an annual salary of \$7,500 payable monthly from the Treasury.

SEC 2. The said Court of Indian Affairs shall always be open for the transaction of business and sessions thereof may, in the discretion of the court, be held in the several judicial circuits and at such places as said court may from time to time designate. The authority of the court may be exercised either by the full court or by one or more judges duly assigned by the court to sit in a particular locality or to hold a special term for a designated class of cases.

SEC 3. The Court of Indian Affairs shall have original jurisdiction as follows:

(1) Of all prosecutions for crimes against the United States committed within the territory of any Indian reser-

vation or chartered Indian community, whether or not committed by an Indian;

(2) Of all cases to which any Indian tribe or chartered Indian community is a party;

(3) Of all cases at law or in equity arising out of commerce with any Indian tribe or community or members thereof, wherein a real party in interest is not a member of such tribe or community;

(4) Of all cases, civil or criminal, arising under the laws or ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community;

(5) Of all actions at law or suits in equity wherein the pleadings raise a substantial question concerning the validity or application of any Federal law, or any regulation or charter authorized by such law, relating to the affairs or jurisdiction of any Indian tribe or chartered community;

(6) Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty;

(7) Of all cases involving the determination of heirs of deceased Indians and the settlement of the estates of such Indians; of all cases and proceedings involving the partition of Indian lands, or the guardianship of minor and incompetent Indians; and of all cases and proceedings to determine the competency of individual Indians where the issuance of cancelation of a fee patent or the removal of restrictions from inherited or allotted lands, funds, or other property held by the United States in trust for such Indians may be involved: *Provided*, That the Court of Indian Affairs shall exercise no jurisdiction in cases over which exclusive jurisdiction has been granted by Congress to the Court of Claims, or to any other Federal court other than the United States district courts, or in cases over which exclusive jurisdiction may be granted by charter provision to the local courts of any Indian community.

SEC. 4. All jurisdiction heretofore exercised by the United States district courts by reason of the fact that a case involved facts constituting any of the grounds of jurisdiction enumerated in the preceding section, is hereby terminated, reserving, however, to such district courts

complete jurisdiction over all pending suits and over all proceedings ancillary or supplementary thereto.

SEC. 5. The Court of Indian Affairs may order the removal of any cause falling within its jurisdiction as above set forth, from any court of any State or any Indian community in which such cause may have been instituted.

SEC. 6. The Court of Indian Affairs shall have jurisdiction to hear and determine appeals from the judgment of any court of any chartered Indian community in all cases in which said Court of Indian Affairs might have exercised original jurisdiction.

SEC. 7. The procedure of the Court of Indian Affairs shall be determined by rules of court to be promulgated by it, existing statutes regulating procedure in courts of the United States notwithstanding. Such rules shall regulate the form and manner of executing, returning, or filing, writs, processes, and pleadings; the removal of causes specified in section 5; the taking of appeals specified in section 6; the joinder of parties and of causes of action, legal and equitable, the interposition of defenses and counterclaims, legal and equitable; the raising of questions of law before trial; the taking of testimony by examination before trial and other proceedings for discovery and inspection; the issuance of subpoenas to summon witnesses and compel the production of documents at trial; the summoning of jurors and the waiver of jury trial; the form and manner of entry of judgments; the manner of executing judgments; the conduct of supplementary proceedings; the survival of actions and the substitution of parties; the amounts and manner of payment of fees to the clerk or the marshal of the court; the practice of attorneys; and such other matters as may require regulation in order to provide a complete system of procedure for the conduct of the court. In general the rules of court shall conform as nearly as possible to the statutes regulating the procedure in the district courts of the United States, the rules of the Supreme Court governing causes in said district courts, and the practice in the courts of the State in which the controversy arises, save that the rules shall so far as possible, be nontechnical in character and fitted to the needs of prospective litigants.

SEC. 8. The court may provide, by rules to be promulgated by it, for appeals to the full court from judgments rendered on circuit by less than a majority of the full court.

SEC. 9. All substantial rights accorded to the accused in criminal prosecutions in the district courts of the United States shall be accorded in prosecutions in the Court of Indian Affairs. The trial of offenses punishable by death or by imprisonment for a period exceeding five years shall be had within or in the vicinity of the reservation or Indian community where the offense was committed.

SEC. 10. In both civil and criminal causes, the right to trial by jury and all other procedural rights guaranteed by the Constitution of the United States shall be recognized and observed.

SEC. 11. In criminal cases the rules of evidence shall be those prevailing in criminal cases in the United States district courts. In civil cases the common law rules of evidence, including the rules governing competency of witnesses, shall prevail: *Provided, however,* That the court shall have the power to amend such rules by rule of court or judicial decision to make them conform as nearly as possible to modern changes evidenced by the statutes and decisions of the United States and the several States, and to adapt them, where necessary, to the solution of problems of proof peculiar to the cases before the court.

SEC. 12. The statutes and decisions of the several States, except where the Constitution, treaties, or statutes of the United States, or the charters or ordinances of Indian communities or orders of executive departments thereunder promulgated, otherwise require or provide, shall be regarded as rules of decision in all civil cases in the Court of Indian Affairs.

SEC. 13. The Court of Indian Affairs shall be a court of record possessed of all incidental powers, including the power to summon jurors, to administer oaths, to have and use a judicial seal, to issue writs of habeas corpus, to punish for contempt, and to hold to security of the peace and for good behavior, which may be exercised by the district courts of the United States, and such powers shall be subject to all limitations imposed by law upon said district



courts. The orders, writs, and processes of the Court of Indian Affairs may run, be served, and be returnable anywhere in the United States. The said court shall perform such administrative functions as Congress may assign to it. The said court shall have the power to render declaratory judgments, and such judgments, in cases of actual controversy, shall have the same force as final judgments in ordinary cases.

SEC. 14. The judges of the Court of Indian Affairs shall hold office for a period of ten years; they may be removed prior to the expiration of their term by the President of the United States, with the consent of the Senate, for any cause.

SEC. 15. The final judgment of the Court of Indian Affairs shall be subject to review on questions of law in the circuit court of appeals of the circuit in which such judgment is rendered. The several circuit courts of appeals are authorized to adopt rules for the conduct of such appellate proceedings, and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern. The said circuit of courts of appeals shall have power to affirm, or, if the judgment of the Court of Indian Affairs is not in accordance with law, to modify or reverse the judgment of that court with or without remanding the case for a rehearing, as justice may require; the judgment of the circuit court of appeals shall be final, except that it may be subject to review by the Supreme Court as provided in the United States Code, title 28, sections 346 and 347.

SEC. 16. The fees of jurors and witnesses shall be fixed in accordance with the provisions of law governing such fees in United States courts generally as provided in the United States Code, title 28, sections 600 to 605.

SEC. 17. The costs and fees in the Court of Indian Affairs shall be fixed and established by said court in a table of fees: *Provided*, That the costs and fees so fixed shall not exceed, with respect to any item, the costs and fees now charged in the Supreme Court.

SEC. 18. The Court of Indian Affairs shall appoint a chief clerk, a reporter, and such assistant clerks and mar-



shals, not to exceed seven each, as may be necessary for the efficient conduct of its business. The said officials shall be under the direction of the court in the discharge of their duties; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session.

SEC. 19. The Attorney General shall provide the Court of Indian Affairs with suitable rooms in courthouses or other public buildings at such places as the court may select for its sessions.

SEC. 20. The chief clerk of the court shall, under the direction of the chief judge, employ such stenographers, messengers, or attendants and purchase such books, periodicals, and stationery as may be useful for the efficient conduct of the business of the court, and expenditures for such purposes shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by the chief judge.

SEC. 21. The judges of the Court of Indian Affairs and the clerks and marshals thereof shall receive necessary traveling expenses, and expenses not to exceed \$5 per day for subsistence while traveling on duty and away from their designated stations.

SEC. 22. With respect to all matters relating to the receipt of fines, costs, fees, bail, and other payments to officials of the court, the custody of funds and the rendering of accounts therefor, the bonding of court officials charged with such custody, the payment of moneys for salaries, traveling expenses, clerical services, the publication of reports of opinions, and office expenses, the laws, departmental regulations, and rules of court applicable to similar matters in the Supreme Court shall apply to the Court of Indian Affairs except as otherwise provided in this chapter.

SEC. 23. The Secretary of the Interior is hereby authorized to appoint not to exceed ten special attorneys whose duty it shall be to advise and represent such Indian tribes or communities as the Secretary of the Interior may designate, and the individual members thereof or to represent

the United States on behalf of such tribes or communities or the individual members thereof. Within ten days of the institution of any proceedings on behalf of such tribes or communities or members thereof, the special attorneys provided for herein shall serve upon the appropriate United States district attorney written notice of the pendency of any such proceedings, together with copy of all the pleadings on file in any such proceeding.

SEC. 24. As used in this title, the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

SEC. 25. Appropriations for the Federal Court of Indian Affairs and for incidental expenses shall be made annually based upon estimates submitted by the Attorney General and appropriations for the special attorneys shall be made annually, based upon estimates submitted by the Secretary of the Interior.

APPENDIX B

[Public—No. 383—73d Congress]

[S. 3645]

AN ACT To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to

exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of \$1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of \$1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift,

exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further,* That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and



the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sum as may be necessary, but not to exceed \$250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress for transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed \$250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than \$50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affili-

ated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and

bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange thereof for interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or

lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot, upon thirty days notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.